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Peoples' Rights as Human Rights: Problematic Aspects

Since the 1970s third generation rights and peoples' rights have become very important in the international human rights theory and practice. At the same time it is clear that they represent the most confusing area of the various theories that are concerned with human rights. The theoretical framework is still in such an initial stage, that there still exist many contradictions and unclarified concepts, and that many of the moral ideas can be converted into actual legal rules only with great difficulty. This new development in theory is due to the revolutionary changes that have taken place within the context of the United Nations in respect of the international practice of human rights, thanks to the influence exercised by the developing countries. Though an increasing number of papers have dealt with this field, there has been little progress made in the solution of a number of problems; only perhaps in the way that problems are raised and defined.[1]

The African Charter on Human and Peoples' Rights is the first human rights convention comprehensively regulating peoples' rights.[2] In this short paper I wish to draw attention to the problems connected with peoples' rights whilst concentrating on the relavant provisions of the Charter. The reason the African Convention seems suitable for a case study is that it marks the crucial point where peoples' rights leave the realm of political declarations, scientific studies and non-binding UN decisions, and enter the field of positive law which is to be directly applied. This present study is also meant to show the defects of

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[1] See e.g. K.J. *Partsch*: Recent Developments in the field of peoples' rights. Human Rights Law Journal (HRLJ) 7(1986) pp. 177-182.; P. Alston: conjuring up human rights: a proposal for quality control. American Journal of International Law (AJIL) 78(1984) pp. 607-621.; R.A. *Tuzmubammedov*: Trete pokolenie prav cheloveka i prave narodov. Sovetskoe gosudarstvo i Pravo (SGP) 1986/11. pp. 106-113.; V.A. *Kartashkin*: Prava cheloveka i ideologicheskaya borba na mezhdunarodnom arene. *SPG* 1987/1. pp. 125-127.; D.U. Vargas: La Troisième Génération des Droits de l'Homme. Recueil des Cours (RdC) 184(1984öl) pp. 359-375.; J.B. *Marie*: Relations between peoples' rights and human rights. HRLJ 7(1986) pp. 195-204.; *Mavi* V.: Szolidaritási jogok vagy az emberi jogok harmadik nemzedéke? (Solidarity rights or human rights of third generation?) Állam- és Jogtudomány XXX/1-2. pp. 151-173.; S.P. *Marks*: Emerging Human rights: A New Generation for the 1980s? Rutgers Law Review 33(1982/1) pp. 435-450.

[2] See International Legal Materials XXI(1982/1) pp. 58-68.

peoples' rights as they exist today. In this respect, the Charter contains the following articles:

— all peoples are equal (Art. 19)

— peoples' right to self-determination (Art. 20/1-3/)

— peoples' right to economic self-determination (Art. 21/1-5/)

— peoples' right to economic, social and cultural development (Art. 22/1-2/)

— peoples' right to the enjoyment of the common heritage of mankind (Art. 22/1/)

— peoples' right to peace and security (Art. 23/1-2/)

— peoples' right to a generally satisfactory environment (Art. 24)

When compared to other human rights conventions, the Charter has a very important, new feature, namely the guaranteeing of a selection of third generation and peoples' rights. It will be necessary to deal with the two types separately, although only peoples' rights are mentioned in connection with the African Charter.[3]

Third generation or solidarity rights can be directly juxtaposed to first and second generation rights. The expression of peoples' rights first of all puts emphasis on the subject of the rights, and the subjects of all the rights listed in the Charter are peoples: hence all of them are referred to as peoples' rights. As is pointed out by Mrs Hanna *Bokor Szegő*, in the first place the principle of classification is the historical development of certain types of human rights.[4] Although third generation and peoples' rights are generally the same, we can find considerable differences as well.

Among the rights guaranteed by the Charter the right to peace and security, the right to a generally statisfactory environment, the right to enjoy the common heritage of mankind and the right to economic, social and cultural development are typical third generation rights. while the others are not normally mentioned as such.[5]

Among the third generation rights there are several, where the subject is not a people, e.g. the right to be different. Moreover, the subjects of many third generation rights are not only peoples but also specific social groups, as well as the individual, e.g. the right to a generally statisfactori environment.[6] In general, however, third generation rights are of a collective nature, i.e. their subject is

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[3] Pl. C.R. *Garrone*: La Charta Africana de Derechos Humanos y de Los Pueblos. Revista Española 36(1984/2) pp. 514-518.; P. *Kunig*: The Protection of Human Rights by International Law in Africa. German Yearbook of International Law. Vol 25. 1982. pp. 156-159.

[4] *Bokorné* Szegő Hanna: Az emberi jogok egyes csoportjainak megkülönböztetése és az alkotmányfejlődés. (Different groups of human rights and constitutional development) Állam- és Jogtudomány XXX/2. (1989) pp. 334. and 344.

[5] *Mavi*: op.cit. supra n.1. at p. 610.; Marks: *op.cit. supra* n.1. at p. 441.; C.E. Welch: Human Rights as a Problem in Contemporary Africa. In: Human Rights and Development in Africa (ed. C.E. welch jr. and R.I. Meltzer) Albany 1984. p. 21.)

[6] Lásd *Bokorné*: op.cit. supra n.4. at p. 344.

undetermined groups, often in the widest sense of the term: the whole body of people. In the existing literature concerning these rights, no more exact definition can be found.

The African Charter endeavours to lay down positive legal norms to be manifest within State parties. Though, in the abstract sense, the whole body of the people can hardly be considered "a people", all the inhabitants living within the frontiers of any given state can easily be identified as a people, which can be regarded as the subject of all regulated third generation rights. Consequently, most of these rights appear as peoples' rights because of their specific subject.

The appearance of peoples' rights in international human rights conventions reises serious problems. Previously, with the exception of the right to self-determination, these rights were mentioned and appeared in certain UN resolutions and publications mostly as theoretical questions.[7] Here, however, they are used as legal norms to be applied, that is they are given an entirely new dimension compared with what went before.

The subject of peoples' rights

When analysing any legal norm, the first step is to determine who is the subject and who is obliged. When the authors of the Charter attempted to define the concept of a people as a subject, they too had serious difficulties. *Steghart* states categorically that no accepted definiton of people exists in the field of international relations.[8] The authors of the Charter were not able to overcome this shortcoming either. Not once has it been remarked that, while the Charter was discussed, the states were anxious to avoid this question just in case the process of codification should lead to never-ending debates.[9] Thiu the concept of a people is used throughout the Charter, even though no consensus on its meaning existed among the signatories. The fact is that a similar situation ensued when the provisions guarateeing the right to self-determination were being formulated within the context of the Covenants of 1966.

Therefore, in the African international law, peoples have rights. A people, however, irrespective of what we mean by it, is unable to enforce its rights directly as it is incapable of acting on its own; it can do so only thorough representatives. A people living within the borders of a state is typically represented by its own state in international relations, and the state enforces peoples' rights.

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[7] E.g. rights to peace: GA/Res. 33/73- (1978); right to development: GA/Res. 34/46. (1979) és 35/174. (1980); principle of peoples' equality: GA/Res. 1625/XXV/.

[8] P. *Sieghart*: The International Law of Human Rights. Oxford 1984. p. 367.

[9] N.S. *Rembe*: Africa and Regional Protection of Human Rights. Roma 1985. p. 112.; E.G. Bello: The African Charter on Human and Peoples' Rights. RdC 194(1985-V) p. 32.; Garrone: op.cit. supra n.3. at p. 514.

From a certain point of view those who are obliged to observe peoples' rights guaranteed by the Charter in an abstract sense, anybody can be bound to observe these rights: the state concerned, another state party, an international company or any other legal person, and/or any individual. This is particularly evident in the case of the right to a clean and healthy environment and the right to economic self-determination. However, an obligation can be enforced only against someone who assumed it, at least indirectly, and who is capable of fulfilling this obligation. In the case of the Charter, it being an international convention, only a state party is obliged to guarantee peoples' rights. Thereafter the state has to establish internal legal rules and only when they enter into force, will other social entities be obliged by means of internal law.

On the basis of the African Charter, the signatory states are, on the one hand, obliged to refrain from violating the rights themselves and, on the other hand, to restrict individuals and legal persons from potentially violating the law. Thus *Sieghart* is incorrect when he says that it is difficult to identify the social entity which is to protect the various rights of peoples,[10] because according to the nature of an international convention, this can be the state only, at least from the standpoint of international law.

In another respect the English author is right, namely that in an abstract sense, taking into consideration the current social conditions, it is usually impossible to identify the social entities that actually violate the abstract right as the violation of a right of this type usually takes place with the involvement of numerous entities including individuals, social groups, economic and other organizations and might go on for a long period of time. The infringement of a right will be the overall result of actions spread throughout space and time, and in most cases it is impossible to identify the entities that are involved in the infringement. One of the many reasons why it is impossible is that it is also difficult to determine when the violation of the right occurred (e.g. the environment is no longer satisfactory). However, all this is a matter of the internal application of the Charter.

There are situations from the standpoint of international law the unity between a people and its state breaks down in one way or other, that is the lawful representative of the people is not its state. Thus in this respect the reference to colonial peoples is justified (Art. 20/2/) as the state subordinating the people is in a situation of illegality and so it is not the lawful representative of the people. In this case the unity between the people and the ruling state does not exist, and the people are entitled to exercise their rights by the exclusion of the state e.g. through a liberation organization.

In other respects the reference to colonial peoples is questionable. The article concerned reads as follows: "Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community." (Art. 20/2/)

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[10] *Siegbart:* op.cit. supra n.8. at p. 367.

Within the member states of the OAU no situation exists which is considered to be explicitly of this kind by those member states. Naturally, the states that do not belong to the OAU and those outside Africa are not and cannot become parties to the Charter. Thus the provision quoted above does not create an actual obligation for any of the states as none of the possible future member state of the Charter owns colonies.

The primary function of the African Convention due to the fact that its nature is that of a human rights convention, is the determination of certain elements of the relationship between the state and the individual and/or certain groups of citizens. Thus Art. 20/2/ creates neither a right nor an obligation since it is directed otuside the circle of the possible signatory states of the Charter. The right formulated here exists in the sphere of the African Charter only in a moral sense and so it is of a declarative nature. It reflects the views and standpoints of the signatory states on a given issue and despite its moral grounding it should not be included in the human rights convention agreed within the OAU.

The same only partly holds true of Art. 20/3/, which is also among the provisions connected with the right to self-determination: "All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural." What we have here is already the establishment of an obligation against the states that are parties to the Charter, though this obligation is too general and the extent of the assistance is not clear. It is impossible to know what the Charter means by "peoples living under foreign domination", which expression in a grammatical sense is wider than "colonized peoples" in the previous article, and stricter than "oppressed peoples" mentioned in the same article. According to this provision a general obligation also exists towards the peoples that are under foreign rule outside the African continent. Nevertheless owing to the far too general nature of the obligation the provision can be considered to be of a declarative nature as no obligation that could be required exists. At the same time this provision apparantly does not suit the function of a human rights' convention.

If we look at Art. 20/2/, we can see that next to the term "colonized peoples" it also contains the category of "oppressed peoples". This term in contrast to the notion of "colonized peoples" can be applied to any of the states participating in the Charter that oppresses the people. In this case, though only on a theoretical basis, the state is obliged to recognize the liberation struggle of its own people against itself. Of course from a practical point of view this statement is completely absurd, especially if we consider the fact that there is no international body that can establish actual oppression and there are no legal criteria as to the oppression of a people. Thus Art. 20/2/ is of an entirely declarative nature when applied to the states participating in the Charter as well. In spite of its declarative nature the notion of "oppressed peoples", when applied to the states participating in the Charter, becomes confusing if we suppose that several peoples might live within the boundaries of the same state.

If that is the case, it may happen that the state representing one of the peoples oppresses another people. The oppressed people can rightfully start a liberation struggle, which indicates that this particular article of the Charter is against the principle of territorial integrity and supports secession. There is no doubt that secession can also be the goal of a liberation struggle.

Because of the ethnic relations the oppressive state organization representing the interests of another people living within the borders of the state might embody foreign rule, so the states participating in the Charter are also obliged to support peoples' efforts at secession contrary to the principles of territorial integrity. It is obvious that numerous difficulties of fact and interpretation may obstruct the establishment of such practice (e.g. it is found that the oppressed ethnic group is not a people). The Charter makes all this possible on one condition: if the term used for a people in the convention alllows that several peoples may live within the borders of the same state.

So the question is what the convention means by "a people". It is important not only from the point of view of Art. 20/2-3/ but also from the point of view of the other provisions relating to peoples' rights, because we are concerned with the subject of the guaranteed rights.

The basic problem is that during the preparation of the Charter there was no consensus on the meaning of the term "people". Thus the Convention uses the term without there being an accepted definition behind it. With the exception of Art. 20/2-3 where the term "people" is preceded by adjectives like "colonized", "oppressed" and "under foreign domination" the convention uses the term without adjectives as an unqualified general concept. We can only except that a somewhat more exact definition of the notion of "people" will be formulated while the Charter is being put into practice, if there is any need for it to be interpreted.

The definition of the concept of "people" has to answer at least one important question as follows. Is there one or more people within the borders of a certain state? This is an essential aspect needed for the evaluation of the possible definitions. In the first case "a people" means the whole body of people living within the borders of state; in the second it is an ethnic group. The Charter does not even answer this basic question, which leads to total confusion in the relating literature.

While attempting a definition, *Balanda* at first admits to the possibility of several peoples living in a given society; then for lack of something better he says, that the concept of "people" cannot be determined in the Charter so later on it will give way to various interpretations.[11] Similarly, while analysing the Charter, *Ngom* and *Eze* interpret the term "people" as an ethnic group, though neither of them try to give a definition.[12] In contrast to them, implicitly though,

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[11] M.L. *Balanda*: African Charter on Human and Peoples' Rights. Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht. 1983/6. pp. 138. and 144.

[12] B.S. *Ngom*: Les droits de l'homme et l'Afrique. Paris, 1984. p. 75.; O. *Eze*: Human Rights in Africa. Lagos, 1984. p. 215.

Kunig and *Bello* interpret the Charter as having the conception of "one state – one people". When analysing Art. 19 the former claims that it can only apply at the international level; when examining the right to secession the latter denies, on the basis of previous practice in the OAU, that is is guaranteed by the Charter in any form.[13]

The latter opinion is backed up by Art. 29/5/ of the Charter, according to which the individual is obliged to preserve and strengthen the territorial integrity of his country. The only case in which it does not contradict Art. 20/1-3/ is when the Charter refers to "a people" as the whole body of people living within the borders of the state concerned. Otherwise, together with the people's liberation struggle it recognized its right to secession, which definitely contradicts the above mentioned obligation to be fulfilled by individuals.

There have been attempts to clear up this confusion by making the meaning of the concept of "people" utterly relative. When analysing the Charter *Kiwanuka* mentions four different alternatives in which the concept of "people" can be interpreted:[14] (i) as a group of people living within a dependent territory; (ii) as a minority group of people within a given state; (iii) as a people as one state; (iv) as the whole body of people living in a given state. These different concepts of "people" are in relation to their different rights. In the first case it refers to the right to political self-determination; the second applies to the subject of minority rights in short the right of existence; the third appertains to the right to economic self-determination; the fourth case covers the other collective human rights. Although it has a few vague and controversial points, this theory is undoubtedly attractive since it draws attention to the prevailing confusion about the concept of "people". Of course such a relative interpretation cannot be tolerated when the enforcement of an international convention is concerned.

The fact the concept of "people" is undetermined made *Garrone* come to the conclusion that the conception prevalent in general international law should be used to help the interpretation.[15] This idea is not acceptable from several viewpoints. It is very difficult to define what is the conception prevalent in general international law, particularly because on the one hand the appearance of further rights may lead to a change in the definition of the concept of "people" implied by these two rights not entirely the same. On the other hand in general international law there are various, even clashing, standpoints.

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[13] *Kunig*: op.cit. supra n.3. at p. 158.; *Bello*: op.cit. supra n.9. at p. 170.

[14] R.N. *Kiwanuka*: The Meaning of "People" in the African Charter on Human and Peoples' Rights. AJIL 82(1988) pp. 80-101.; Scoble mentions only three possible definitions: Human Rights. Non-Governmental Organizations in Black Africa. In: Human rights and Development in Africa (Ed. C.E. Welch jr. and R.I. Meltzer) Albany, 1984. p. 203.

[15] *Garrone*: op.cit. supra n.3. at p. 514.

For instance, according to *Batailler-Demiches* the concept of "people" is so indeterminable that any kind of theoretical manipulation is conceivable.[16] At the same time it is unlikely that the African states and the Committee will rely on the general concepts, but the actual cases and the African specifications will determine the interpretation.

The content and nature of peoples' rights

I have already mentioned that one of the characteristics of the Charter is that it guarantees peoples' rights, but it is not without precedents. Besides the UN documents already referred to the Algiers Declaration of Peoples' Rights from 1976 also has to be mentioned as it contained most of the rights guaranteed by the Charter.[17]

A lot of international conferences have dealt with the problem of the right to self-determination, and as a result there is a large number of documents in this connection. At a theoretical level the bulk of literature concerning the right to self-determination and the specific ideas of the third world concerning human rights also have a considerable effect.

The conception of peoples' rights can also be found in Eastern European literature: e.g. in the 1960s *Bobrov* mentions the observance of peoples' rights among the basic principles of international law.[18]

Before the Charter only the right to self-determination was formulated as an international legal norm. Even at an international level the interpretation of this right gave rise to a lot of controversy, and when trying to define what is meant by "a people", we could see that numerous difficulties crop up in the Charter too in respect of this right, particularly in view of the previous practice within the OAU.

In the African Convention the right to economic self-determination, which according to paragraphs 1 and 4 is exercised by the state in the name of the people, is regulated in a separate article (Art. 21). The state parties to the Charter expressly undertake the obligation to eliminate all forms of foreign

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16 "Il est certain que la notion même de peuple est dotée d'un relativité en ce sens que l'existence ou la non existence d'un peuple n'est pas toujours scientifiquement démontrable. Et à partir de là, n'importe quelle manipulation peut être théoriquement possible." F. *Bateiller-Demichel*: Droits de l'homme et droits des peuples dans l'ordre international. In: Le droits des peuples à disposer d'eux-mêmes. Mélanges offerts à Charles Chaumont, Paris, 1984. p. 32.

17 A. *Cassesse*: Political Self-Determination, pp. 153-157.; F. Rigaux: The Algiers Declaration of the Rights of Peoples, pp. 211-224.; R. *Falk*: The Algiers Declaration of the Rights of Peoples and the Struggle for Human Rights, pp. 225-235. For all the three works see, UN Law-Fundamental Rights (ed. A. Cassesse) Alphen aan den Rijn 1979.

18 Basic principles of present-day international law (ed. G.I. Tunkin) Moscow, 1969. p. 49.; see also A.P. *Movchan*: Prava cheloveka i mezhdunarodnie otnoseniya (Human rights and international relations) Moscow, 1977. p. 43.

economic exploitation, in particular those used by international monopolies (Art. 21/5/).

The inclusion of a state obligation of this type in the convention raises a serious problem. According to *Kunig* in a number of African states economic relations with multinational companies play a very important role so it is questionable to what extent such an obligation can be fulfilled in the future.[19] In the case of foreign capital investments, very important in many African countries, the implementation of such an obligation involves nationalization as well, which is not in accordance with the right to property.

This article is even more problematic when seen in its relationship with the right to economic, social and cultural development. As early as 1973 at the Conference held in Dar-es-Salaam the participants pointed out that certain aspects of the right to economic self-determination are in contrast with the requirements of development. It is indispensible to encourage foreign capital investment and grant concessions so that most of the African states can make considerable progress.[20]

The contradiction between these two provisions of the Charter can only be eliminated by changing the meaning of the concept of "foreign economic exploitation", a concept which, for that matter, is very difficult to define. It would give the state complete freedom to decide which foreign company of foreign capital investment can be adjudged as exploiting and violating the right to economic self-determination. There being no enforceable obligation against the state party to the Charter, this freedom of the state renders Art. 21/5/ a mere declaration.

There is a similar problem in connection with Art. 21/2/, according to which a people deprived of its property has the right to lawful recovery of its property, as well as to an adequate compensation. It is obvious that this provision, at least partly, refers to the possibility of nationalization and this can contradict certain aspects of the right to economic self-determination and the requirements of development. It must be emphasized that the Charter does not establish an obligation towards the state to restore the properties of the people; what is guarateed is only the right in an abstract sense and the possibility. Thus this article is also of a mere declarative nature: there is not any kind of obligation described and the states may nationalize on the basis of other international legal norms as well.

We can also notice the declarative nature of peoples' rights if we read Art 20/1/, which describes the right to political self-determination. It says that peoples have the freedom to decide on their political system, and guarantees development by their freely chosen political system. In the articles dealing with political rights the authors of the Charter could have guarateed these rights of peoples with concrete and detailed norms since some of the political rights

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[19] *Kunig*: op.cit. supra n.3. at p. 158.

[20] UN Doc. ST/TAO/HR/48. para. 46.

provide an opportunity for the detailed positive legal regulation of this general principle in human rights conventions.

In democracies the political system and the policies are determined through representatives elected by the citizens. The election has its very strict guarantees which serve to make sure that the will of the people prevails as adequately as possible. In the Charter, however, there are no important guarantees such as holding elections at regular intervals, universal and equal suffrage and secret ballot, which can be found in other human rights documents.[21] Keeping this in mind we can hardly regard Art. 21/1/ as anything but having a declarative nature, since it does not establish obligations.

This declarative nature and the lack of concrete obligations are typical of all the "rights" mentioned among peoples' rights in the Charter. Examining these rights we can find only one enforceable obligation in Art. 23/2/. This article, within the framework of the right to peace and security on the one hand obliges the participating states to make certain that a person granted asylum in their territory is not engaged in subservise activities against another state, and on the other hand no one can use their territory as a base for such subversive activities against the people of any other state.

Interestingly, the provisions of Art. 23/2/ can also be described as insignificant from the practical point of view. The prohibiton against assistance to subversive activities is *expressis verbis* regulated in Art. II. of the African Refugee Convention of 1969[22] and by implication in Art. III./3/ of the OAU Charter.[23] Thus the article has only one practical consequence, namely that the institutions set up by the Charter (e.g. the African Comission on Peoples' and Human Rights) can be involved in the implementation process. Nevertheless it is not a good idea to deal with the prohibition against subversive activities in connection with the peoples' right to peace and security because it is directly and mainly aimed against the state organization and sovereignty.

The general phrasing and the declarative nature of peoples' rights does not make it possible to analyse the substance of these rights from a legal point of view. Any attempt at the legal regulation of these rights will be very uncertain until the most important economic, social and moral aspects of the rights have been clarified and they have appeared as real legal norms.

Taking the right to development as an example, we can see the following. Development as a right was first mentioned by K. *M'Baye* in 1972. In a UN document it first appeared in 1977 in the Resolution 4/XXXIII/,.of the

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[21] See Universal Declaration of Human Rights, Art. 21 (1) and (3); American Declaration of the Rights and Duties of Man, Art. XX.; International Covenant on Civil and Political Rights, Art. 25.; American Convention on Human Rights, Art. 23 (1); The European convention on Human Rights, Protocol I. Art. 3.

[22] See UNTS No. 14. 691.; in: G.S. *Goodwin-Gill*: The Refugee in International Law. Oxford 1985. p. 283. (Annex)

[23] See Nemzetközi szerződések 1945-1982. (International treaties) (Ed. Halmosy D.) Budapest, 1985. p. 382.

Commission on Human Rights where it is mentioned as an existing human rights; since 1979 The General Assemmbly of the UN has declared it in several of its resolutions. Although some authors, e.g. *M'Baye, Gros-Espiel, Abi-Saab* and *Zerwey,* have already started to analyse it, the theoretical basis and the concrete elements of the right have not been explored yet and neither has it been precisely phrased so far. The UN bodies only declared it at the turn of the eighties but they have not started a debate over it.[24]

As a result of such precedents the Charter included the right to development among its articles as a legal norm expected to be implemented. In 1981, the year the Charter was passed, *Marks* said that it was too complex a task to give a more precise determination of the substantive elements of the right,[25] whereas this is the starting point of all legal analyses.

It is obvious that the right to development in its general sense cannot function as a legal norm. Comprehensive analyses have to aim at finding the elements of the general category which later on can be applied as legal norms. These comprehensive analyses started at the beginning of the eighties from two points of view: (i) the international legal theory of development; (ii) development as a human right.[26] In the future these analyses could serve as a basis for the elaboration of the concrete legal norms which would help the implementation of the general right to development.

The above thoughts apply to all human rights included in the Charter that are concerned with peoples. The question arises whether the authors of the Charter had any justification for inserting peoples' rights in the convention. According to *Donelly* what is good and desirable is not necessarily a right, especially not a human right.[27] Indeed, as far as existing peoples' rights are concerned they first of all embody social values and moral principles in a few categories. I have already mentioned that these general categories cannot directly function as legal norms, they cannot create enforceable obligations. This does not mean that the potential legal realization of these values should be given up. It is necessary to determine the concrete elements of the general categories referring to the above mentioned values that can function as enforceable legal norms.

The African convention, however, wishes to turn the general categories containing values immediately into rights. These concepts are suitable for the discription of certain real problems and thus they can be used in ethical or social analyses and scientific papers. In the same way they function well in certain declarations and resolutions because there it is a question of social values and positive intentions. In international conventions the concepts that

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[24] *Marks*: op.cit. supra n.1. at pp. 444-445.; Alston: op. cit. supra n.1. at p. 613.

[25] *Marks:* idem, at p. 445.

[26] *Mavi*: op.cit. supra n.1. at pp. 153-158.

[27] J. *Donelly*: The Right to Development: How Not to Link Human Rights and Development. In: Human Rights and Development in Africa (ed. C.E. Welch jr. and R.I. Meltzer) Albany, 1984. p. 265.

are used have served entirely different functions: what is meant by them has to be directly applied. Thus the usage of concepts become very important; the concepts need to have precisely determined contents because of the change in their functions.

In the Charter peoples' rights are phrased in a general and undifferentiated way and they hardly contain any enforceable obligations. Thus the phrasing makes these articles declarative, which do not suit the functions of international conventions. Not only do they not suit the required functions, but in relation to the other parts of the convention they become definitely disfunctional. This is one of the main concerns about the inclusion of peoples' rights in the Convention in this form, which fact is referred to by several authors.

Ojo and *Sesay* call the inclusion of peoples' rights in the Convention a fact that gives rise to disquiet because by invoking peoples' rights the states can infringe the rights of the individual. Several more authors express the same idea.[28] *Vincent* holds the opinion that based on socialy harmony the African approach gives priority to collective rights against the right of the individual.[29] *Ametistov* says that the provision of third generation rights diminishes the importance of the human rights that have already been guaranteed and hinders their development.[30]

In the particular case of the Charter the infringement of individual rights by invoking collective rights in only an abstract possibility for the time being. In my opinion, which is partly different from the views of those I have cited, the reason this possibility exists is not the fact that there are collective rights on one side and individual rights on the other. Again the main problem is that peoples' rights have a very undetermined and general nature. Therefore these abstract categories cannot be contrasted or juxtaposed with other human rights and the relation between them cannot be defined. The fact that this relation cannot be defined gives the executing states complete freedom during the implementation of the rights, which also gives them a wider scope for interpretation. These vague categories may give a great deal of scope for various activities of the state. Peoples' rights and individual rights do not necessarily contradict each other, as

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[28] O. *Ojo* – A. *Sesay*: The OAU and Human Rights. Human Rights Quarterly 1986/1. p. 99.; *Ngom*: op.cit. supra n.12. at pp. 74-75.; *Scoble*: op.cit. supra n. 14. at p. 193.; Sieghart: op.cit. supra n.8. at p. 368. This latter says "abstract concepts have in the past only too often presented grave dangers to the enjoyment by individuals of their human rights and fundamental freedoms... If any of the individual rights and freedoms protected by modern international human rights law ever came to be regarded as subservient to the rights of a "people" ... there would be a real risk that legitimacy might yet again claimed on such a ground for grave violations of the human rights of individuals."

[29] R.J. *Vincent*: Human Rights and International Relations. Cambridge, 1986. p. 39.

[30] E.M. *Ametistov* – E.V. *Klinova* – B.G. *Manov*: Obespecheniye prav i svobod cheloveka v mezhdunarodnom prave (Human rights and freedom in international law) Moscow, 1986. pp. 43-46.

this contradiction exists only as a potentiality. A lot depends on how the African Commission works during the implementation, on how the rights are interpreted and chiefly on the good faith of the states.

Peoples' rights and the state

About the philosophy of the Algiers Declaration of 1976 *Cassesse* says that it tries to create rights for peoples that are independent of the state. This standpoint cannot be found in the African convention, because of the nature of the document, which as an international convention is expected to be enforced. Peoples are the beneficiaries of these rights, but not their enforcers. Peoples are not capable of acting on their own, only through representatives. This representative is usually the state, and only exceptionally another organization. The state tries to achieve the enforcement of the rights in the name of the people and invoking the people.

As far as the right to economic self-determination is concerned the state as representetive is expressly mentioned in the Charter. Art 21/1/: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. ..." Art. 21/4/ stipulates the following: "States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources..." Here the right to economic self-determination appears unambigously as the right of the state.

If the concept of " a people" allows that there be more than one people within one state, the distribution of national wealth among the peoples living together is very precarious. The problem also exists if it is found that one of the several ethnic groups living within one state is a people (it may even be arbitrary) and the others are treated as simple ethnic minorities. A people can have wealth and natural resources while a minority ethnic group cannot have anything. This takes us into the domain of absurd conclusions, which shows that if the concept of "people" is similar to the one above, the economic self-determination put forward in the Charter, in theory as well as in practice, is the prerogative of the state only.

The language of Art. 21 has one result directly bearing on this right: the state has free disposal of everything owned by its peoples living within the borders of the state, that is the wealth and natural resources of the country, the free disposal of which falls under a few formal restriction. However, the state would have had the same right without it being declared in the Charter.

According to Art. 19 all peoples are equal, they deserve the same respect and have the same rights. This provision only makes sense if more than one people can live within the borders of one state. In this case equality and equal rights are already guaranteed by the prohibition of discrimination, as a fundamental human right. This also protects the people by protecting the individual.

In case of the idea of "one state-one people" the problem necessarily arises in the international field. Here it is the state that acts as the representative of the people, so that this right (Art. 19) actually appears as the right of the state, as in the case of the right to economic self-determination.

The situation is similar in connection with the right to existence (Art. 20/1/). Inside the state the ethnic groups are protected by the prohibition of discrimination and genocide. In international relations this right appears as the state's right to existence and it can be classified as one of the basic principles safeguarding the sovereignty of the state. On the international scene the right to national and international peace and security also manifests itself in relations between states (see second sentence of Art.23/1/), and it appears in connection with the legal status of the state.

In fact most peoples' rights manifest themselves as the rights of the state. E.g. the state disposes of all economic resources, it determines the course and space of development etc. Actually the state exercises the rights which have originally been classified as human rights. In their more concrete form, however, they lose their characteristics as human rights since they appear as the rights of the state. The stipulation of the rights of the state in this way is not in accordance with the functions of an international human rights convention.

In the case of peoples' rights the state is the only entity that formally owes obligations within the convention. In case of peoples' rights, strangely enough, the most concrete obligation of the state (Art. 23/2/) is not towards its own people but towards other states. The state's existing obligations towards its own people are, even in a formal sense, rather general and thus insubstantial. The following breaches of obligation can occur on the part of the state towards its own people: it allows foreign economic exploitation; the people are not allowed to determine freely their political status; the state does not guarantee a generally satisfactory environment or the economic, social and cultural development of the people, etc. Towards other peoples: for instance it does not support oppressed peoples, If an international body supervising the implementation of the rights found such "breaches", it would probably indicate the collapse of the system of international law based on the priciple of sovereignty. These examples of the potential violations clearly shows the lack of enforceable obligations and the declarative nature of peoples' rights.